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MONTANA PROSECUTOR

MAY/JUNE, 1980 VOL. 4, NO. 3

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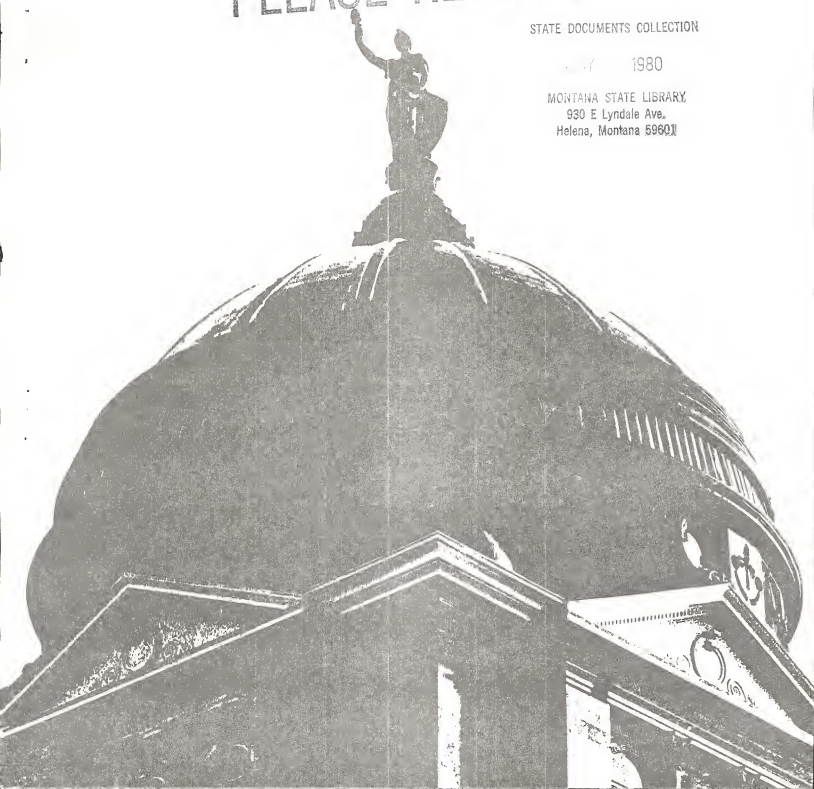

INTRODUCTORY NOTES

The annotations to the Montana Criminal Code have been completed and are available in loose-leaf form from the State Bar of Montana, 2030 11th Avenue, Helena, Montana, 59601, 442-7660, at a cost of $10.00 per copy. In order to obtain a copy, call or write directly to the State Bar of Montana.

In this issue, for your information and guidance, is a letter detailing the procedure for processing responding URESA complaints in Los Angeles County. Also included are two memos published by Americans For Effective Law Enforcement dealing with the AELE amicus curiae program, with which the County Prosecutor Services Bureau has worked, and an AELE survey on police liability.

The Montana County Attorneys Association annual Convention will be held at Fairmont Hot Springs from July 16 to July 19, 1980. Preston Trimble, former President of the National District Attorneys Association and currently a District Judge in Norman, Oklahoma will be a featured speaker. The tentative schedule of events is as follows:

WEDNESDAY - JULY 16, 1980

10:30 a.m. - 12:00	Registration
12:00	Lunch - Open
2:00 - 3:00 p.m.	Board of Directors (Room 107)
3:00 - 3:15 p.m.	Coffee Break
3:15 - 4:30 p.m.	Mental Disease or Defect - House Bill 877 and Its Aftermath - Rep. Mike Keedy, Dr. William D. Stratford and Mike McCarter
4:30 - 5:00 p.m.	Business Meeting (Nomination of Officers)
5:00 p.m.	Adjourn
Dinner	Open

THURSDAY - JULY 17, 1980

9:00 - 10:00 a.m.	Supreme Court on Parade - A Review of the Court's Recent Decisions - Rick Larson, Mary B. Troland, Assistant Attorneys General
10:00 - 10:30 a.m.	Coffee Break
10:30 - 12:00	Supreme Court Decisions (Cont.)
12:00 - 1:30 p.m.	Lunch - County Attorneys' Association
1:30 - 3:00 p.m.	Supreme Court Candidates - Individual Remarks by Candidates
3:30 - 5:00 p.m.	Question and Answer - Supreme Court Candidates
5:00 p.m.	Adjourn
5:30 - 6:30 p.m.	Children's Dinner
6:30 p.m.	Patio Cocktail Party
6:45 - 8:30 p.m.	Children's Movie
7:30 p.m.	Dinner - County Attorneys' Association

FRIDAY - JULY ~~25~~ 18, 1980

9:00 - 10:00 a.m.	State v. Austad, Special Trial Problems Bob Vermillion
10:00 - 10:15 a.m.	Coffee Break
10:15 - 10:45 a.m.	Antitrust - Jerry Cate
10:45 - 11:00 a.m.	Coffee Break
11:00 - 11:30 a.m.	Mountain Bell Security
12:00	Lunch - County Attorneys' Association
1:30 - 2:30 p.m.	Preston Trimble - Former President NDAA District Judge - Norman, Oklahoma
2:30 - 3:00 p.m.	Attorney General Mike Greely
3:00 - 6:00 p.m.	Golf - Bridge - Tennis Tournaments
5:30 - 6:30 p.m.	Children's Dinner
6:30 - 7:30 p.m.	Patio Cocktail Party
6:45 - 8:30 p.m.	Children's Movie
7:30 p.m.	Banquet - County Attorneys' Association

SATURDAY - JULY ~~26~~ 19, 1980

9:00 - 11:00 a.m.	Legislation - 1981 Legislature
11:00 - 12:00	Business Meeting
12:00	Adjourn

If any prosecutors have had any experiences with the new mental disease or defect law (House Bill 877), you are requested to communicate your problems, concerns or opinions to Marc Racicot as soon as possible.

RECENT CASES AND NOTES

LESSER INCLUDED OFFENSES - PENALTY

In a case with a thorough discussion of the tests for whether one offense is a lesser included offense of another, false imprisonment by violence is held to be a lesser included offense of kidnapping, even though the penalties were the same. State v. Caudillo (Ariz.) 604 P.2d 1121.

ACCOMPLICE - AID AND ABET

A defendant who "merely" caught the victim when she tried to escape another's sexual attack could be convicted of the substantive sexual offense the other committed upon the victim, under accomplice statutes. State v. Hernandez (Hawaii) 605 P.2d 75.

ARREST

An officer patrolling alone late at night who had reasonable cause to stop a car with three people in it for armed robbery, acted reasonably when he used the bullhorn and told the occupants to remain in the vehicle until assistance arrived. People v. Johnson (Colo.) 605 P.2d 46.

BITEMARKS - EVIDENCE

Another state joins the list of those admitting bitemark evidence. State v. Peoples (Kan.) 605 P.2d 135.

DEATH PENALTY - AGGRAVATING CIRCUMSTANCES

Where the defendant killed one victim and shot two other persons shortly thereafter, his convictions for attempted murder, which were entered at the same time as the murder conviction, could be considered as aggravating circumstances for the purpose of imposing the death penalty for the murder conviction. Lucas v. State (Fla.) 376 So.2d 1149.

DEFERRED PROSECUTION - DWI

The defense couldn't enter defendant in a deferred prosecution program over the prosecutor's objection. The court's power to dismiss the prosecution for various reasons did not include power to defer prosecution. State ex rel Schillberg v. Cascade Dist. Ct. (Wash.App.) 604 P.2d 491.

DWI - CUSTODY

A motorist who was stopped by an off-duty policeman in a patrol car was not in custody merely because the officer removed the keys to the motorist's car and took her driver's license. Miranda was not required during initial questioning by officers responding to the call, even though she was not free to leave, and her volunteered statements were properly admitted. State v. Chaput (Or.App.) 604 P.2d 435.

ENTRAPMENT - DRUGS AND NARCOTICS

It is not entrapment per se when the government provides a controlled substance to a defendant who is subsequently arrested for selling that substance. The doctrine of entrapment only applies when the defendant is not predisposed towards the offense. People v. Cross (Ill.) 396 N.E.2d 812.

EXPERTS

Where the defendant's height and whether he had a gold tooth were important factors in his identification, he was not entitled to the appointment of experts to testify regarding those physical conditions. The characteristics involved could be determined by observations based on everyday experiences, and expert knowledge was unnecessary. Royston v. State (Ind.) 397 N.E.2d 285.

FALSE PRETENSES - THEFT

Restitution is not a defense to a crime involving false pretenses. State v. Yarber (S.D.) 285 N.W.2d 592.

HEARSAY - INCOMPETENT VICTIM

A statement by an incompetent two-year old child molestation victim that "[defendant] hurt my pee-pee" was properly admitted as part of the res gestae where the statement was made as soon as the victim saw her mother, within 1/2 hour of the crime. People v. Lancaster (Colo.App.) 605 P.2d 67.

IDENTIFICATION - ARREST

Holding a defendant who reasonably matched the description of a fleeing burglary suspect for 8 minutes until the victim arrived to identify him was proper. (Defendant claimed he didn't know the origin of $250 found in the undershorts he was wearing.) State v. Walker (Wash.App.) 604 P.2d 514.

LEGAL IMPOSSIBILITY

Where the defendants paid a police informant money for goods which they thought were stolen, the doctrine of legal impossibility did not bar their prosecution for conspiracy and attempt to receive stolen property. State v. Bird (Minn.) 285 N.W.2d 481.

LESSER INCLUDED OFFENSES

The state can charge and prove lesser included offenses so long as the jury is instructed it can convict defendant on only one of the two offenses. The trial court committed reversible error when it required the state to elect between the charges. State v. Rapp (Wash.App.) 604 P.2d 534.

MIRANDA

Where defendant went to the station to pick up the title to his wrecked car and stated that his attorney told him not to talk about the charged crime, an officer asking him, just out of curiosity, whether he crawled or was ejected from the car was not custodial interrogation. Defendant went to the station voluntarily and left when he wanted to, so his answer was admissible. State v. Burt (Wash.App.) 605 P.2d 342.

MIRANDA - EXCLUSIONARY RULE

Failure of a foreign (Canadian) police officer to give Miranda warnings is not grounds for excluding defendant's confession. The purpose of the exclusionary rule is to deter police misconduct, and applying it to foreign officers would achieve nothing. State v. Vickers (Wash.App.) 604 P.2d 997.

PRELIMINARY HEARING - RAPE

Where the defendant was eventually given a public trial, barring the public from the examination of the rape victim at the preliminary hearing was not reversible error. People v. Pompa-Ortiz (Cal.App.) 160 Cal.Rptr. 42.

PROSECUTORIAL DISCRETION

Where the defendant fled the jurisdiction in his prosecution for arson, he could be tried for failure to appear before he was retried on the arson charge. This manuever allowed the prosecution to introduce evidence of the failure to appear conviction to show the defendant's consciousness of his guilt on the arson charge. State v. Zeko (Conn.) 407 A.2d 1022.

PROSECUTOR STANDARDS

Filing habitual criminal charges in certain classes of crimes (violent) but not in others (small narcotics, theft cases) according to prosecutorial standards does not deny defendant due process or equal protection. State v. Thornton (Wash.App.) 604 P.2d 1004.

RECEIVING STOLEN PROPERTY

In a prosecution for receiving stolen property, the value of the property should be determined on the day the defendant receives the property. Tussey v. Commonwealth (Ky.) 589 S.W.2d 215.

VOIR DIRE - REASONABLE DOUBT

The court did not abuse its discretion by refusing to allow the defense attorney to ask prospective jurors what "reasonable doubt" meant to them. State v. Lumsden (Mo.) 589 S.W.2d 226.

SELF-DEFENSE - OPINION

Although a defendant could testify to what he knew about the victim's violent reputation under Rule 405, he did not know about the victim's aggravated battery conviction, so barring evidence of the prior conviction was proper. State v. McCarter (N.M.) 604 P.2d 1242.

ACCOMPLICE - HOMICIDE

Defendant was properly convicted of manslaughter under instructions which, in essence, said that if he was an accomplice to an aggravated assault and the death of the victim was reasonably foreseeable, he should be convicted. It was unnecessary, under Maine law, for defendant to have intended to aid and abet the crime of manslaughter. State v. Goodall (Me.) 407 A.2d 268.

BIRTHDAY - SOCIAL SECURITY NUMBER

Giving a false birthdate and false social security number constitutes making a material misstatement on a loan application under federal statutes, since false information on these items would make a credit check much more difficult. United States v. Phillips (9th Cir.) 606 F.2d 884.

CONSPIRACY - HEARSAY

The court properly allowed the prosecution to introduce hearsay statements of the conspirator prior to the introduction of evidence establishing the existence of the conspiracy where it instructed the jury that it should not consider the statements until they had evidence that the conspiracy actually existed. United States v. Vargas-Rios (9th Cir.) 607 F.2d 831.

DRUGS AND NARCOTICS

Rebuttal evidence that an anonymous informant told the officer the informant had bought cocaine from a man with defendant's name and description was properly admitted after defendant claimed entrapment. United States v. Webster (5th Cir.) 606 F.2d 581.

EVIDENCE - BITE MARKS

The court did not abuse its discretion in admitting an expert's opinion testimony that the defendant's teeth matched bite marks on the victim. State v. Jones (S.C.) 259 S.E.2d 120.

EVIDENCE DESTRUCTION - INSTRUCTIONS

Failure to analyze some drilling shavings sent to the lab because of time constraints, did not entitle defendant to an instruction that failure to produce the evidence allowed the jury to infer the evidence would have favored defendant. State v. Gakin (Wash. App.) 603 P.2d 380.

EVIDENCE - EXEMPLARS

Even if no authority existed allowing the court to order defendant to give handwriting samples prior to arrest, the court ordering defendant to give the samples was not error. Probable cause existed to arrest defendant, and the samples could have been taken after arrest. State v. Mitchell (Kan.) 602 P.2d 1383.

HEARSAY

The court properly admitted copies of microfiche records of telephone calls which had been printed out from magnetic computer tapes despite a claim that they were inadmissible because they were not the "original or first permanent entry." The prosecution established that the equipment was standard and that the entries were made in the "regular course of business." Brandon v. State (Ind.) 396 N.E.2d 365.

HOMICIDE - FELONY-MURDER

Felony-murder and premeditation are merely alternative ways of proving the crime of first degree murder. Defendant's conviction on a felony-murder theory during the first trial, when both theories were urged, did not prevent his retrial and conviction under a premeditation theory after his first conviction was reversed on appeal. State v. McCowan (Kan.) 602 P.2d 1363.

HOMICIDE - MOTIVE

The state is not required to introduce any evidence of motive even in a case involving first degree murder. Commonwealth v. Brantner (Pa.) 406 A.2d 1011.

IDENTIFICATION

The actions of the police in telling the victim that there was a suspect in the lineup did not create a "substantial likelihood of irreparable misidentification at trial." Young v. State (Ind.) 395 N.E.2d 772.

Failure to have the victim explicitly identify defendant as the person who committed the crime was not reversible error, where identification of defendant was implicit in the entire transcript. Wells v. State (Okl.Cr.) 604 P.2d 145.

JURY

Telling the jury to keep deliberating after they sent a note stating they were deadlocked did not constitute giving an Allen charge. Farmer v. State (Nev.) 603 P.2d 700.

OPINION - REPUTATION

It was proper under Rule 608 to allow the prosecution to recall a witness after defendant testified, and elicit that the witness, a former employer, would not believe defendant under oath. United States v. Lollas (5th Cir.) 606 F.2d 587.

PRIOR BAD ACTS - PRIOR CONVICTIONS

Where footprints led from the drilled safe to the defendant's home, which he shared with others, and a drill fitting the holes was found in his bedroom and defendant claimed others were responsible, a prior burglary guilty plea transcript was properly admitted as substantive evidence and to impeach his denial that he didn't know how to drill a safe. State v. Gakin (Wash.App.) 603 P.2d 380.

PROSECUTORS - RECUSAL

In the defendant's prosecution for vandalism, the fact that two prosecutors who were not involved in the case had their tires slashed in independant incidents, did not require the recusal of the prosecutor's office. People v. Municipal Court (Cal.App.) 159 Cal.Rptr. 639.

RAPE - PSYCHIATRIC EXAMINATION

The fact that the rape victim had been smoking marijuana and drinking shortly before the incident was not sufficient to show that a psychiatric examination was necessary to "protect the defendants from being the victims of fantasy or psychic complex." State v. Reimon (S.D.) 284 N.W.2d 860.

SEARCH AND SEIZURE

Where the defendants had been detained for transfer to an alcohol detoxification center, police could inventory their property, and stolen goods found during the inventory were not subject to suppression. United States v. Gallop (9th Cir.) 606 F.2d 836,

Where the defendant's rental agreement did not include a metal outbuilding located behind the house he leased, he had no standing to object to a search of the outbuilding. State v. Alford (N.C.) 258 S.E.2d 242.

Citing, inter alia, an Arizona Supreme Court case, the Washington Court of Appeals holds that the odor of burning marijuana coming from a privately owned vehicle constituted probable cause to arrest and search the driver and passenger in the vehicle. State v. Hammond (Wash.App.) 603 P.2d 377.

SEARCH AND SEIZURE

The police may make a warrantless entry of a fire scene after the fire has been extinguished to determine its cause. The motivation of the police, here a narcotics officer who was called to investigate a fire at an illegal drug factory, does not affect the exigency justifying the warrantless entry. United States v. Callabrass (2nd Cir.) 607 F.2d 559.

DEATH PENALTY - AGGRAVATING CIRCUMSTANCES

After defining the terms cruel, heinous or depraved separately, and giving examples of a type of killing that fit one or the other, the court holds that gratuituously killing an unconscious witness does not fall in this category of aggravation, and reduced defendant's sentence to life. State v. Lujan (Ariz.) 604 P.2d 629.

FELONY-MURDER - SENTENCE

Defendant could be sentenced for burglary and felony murder, based on his gratuitous killing of an unconscious witness to the burglary. State v. Lujan (Ariz.) 604 P.2d 629.

FLIGHT - INSTRUCTIONS

The fact that defendant and his companions ran from the scene of the burglary after one participant knocked out a witness and a second stabbed the witness, was sufficient to justify a flight instruction. State v. Lujan (Ariz.) 604 P.2d 629.

GAS CHROMATOGRAPH INTOXILYZER

Due process requires that the state preserve a sample of defendant's breath when the G.C.I. is used, if, after being informed of the right to the sample, defendant requests it. Baca v. Smith (Ariz.) 604 P.2d 617.

DEATH PENALTY - AGGRAVATING FACTORS

Poisoning a man constituted an especially heinous, atrocious or cruel killing in this case. The first dose of strychnine didn't work so defendant fed the victim another after he got out of the hospital. State v. Barfield (N.C.) 259 S.E.2d 510.

DWI

Testimony about open containers of liquor in the car of a defendant charged with DWI may be admitted. Parsons v. State (Okl.Cr.) 603 P.2d 1144.

DWI - ACTUAL PHYSICAL CONTROL

A defendant passed out behind the wheel of a running automobile is in actual physical control of the automobile. The case cites another decision upholding the conviction of a defendant found unconscious behind the wheel, engine off but with keys in the ignition. Mason v. State (Okl.Cr.) 603 P.2d 1146.

DWI - ARREST

Defendant's running a stop sign and swerving, odor of alcohol on his breath and inability to pass dexterity tests constituted probable cause to arrest him for DWI. State v. Wright (Kan.App.) 603 P.2d 1034.

EQUAL PROTECTION - ASSAULT

A statute which penalizes an assault on a police officer more severely than an assault on a ordinary citizen does not violate equal protection. Williams v. State (Tex.Cr.App.) 588 S.W.2d 593

FORFEITURE - MONEY

The government was not required to return money which the defendant paid to an undercover agent in the course of a heroin transaction since "it is contrary to public policy to permit the courts to be used by the wrongdoer. . .to obtain the property he voluntarily surrendered as part of his attempt to violate the law." (Dicta approves forfeiture statutes for money involved in drug transactions) United States v. Farrell (D.C. Cir.) 606 F.2d 1341.

GUILTY PLEA - COUNSEL

Defendant's guilty plea waived a potential conflict of interest where the same counsel represented two codefendants. Roles v. State (Idaho) 604 P.2d 731.

HOSTAGES - AMNESTY

An agreement by government officials to grant defendants amnesty in exchange for the release of hostages is voidable by the government since it is induced by duress. United States v. West (9th Cir.) 607 F.2d 300.

JUDGES

"[I]n a non-jury trial, the court may ask such questions as it may deem necessary to clearly bring out the facts so that the important functions of its office as trier of fact can be fairly and justly performed." People v. Casias (Colo.App.) 603 P.2d 969.

INDIGENTS

A defendant who had assets worth $750, no out-standing debts, and was able to work was properly denied appointed counsel. State v. Gordon (Or.App.) 603 P.2d 1196.

PRIOR BAD ACTS - INSANITY

In the defendant's trial for poisoning her employer with arsenic, evidence that she had poisoned four other persons, including her husband and mother, with arsenic was admissible to show that she knew the probable consequences of her acts. State v. Barfield (N.C.) 259 S.E.2d 510.

PROBABLE CAUSE - POLICE OFFICERS

The total knowledge of all officers involved may be used to establish probable cause even if not all the knowledge was communicated to all the officers. United States v. Bernard (9th Cir.) 607 F.2d 1257.

RAPE

The court did not abuse its discretion in refusing to allow the defendant to introduce a nude photograph of the prosecutrix which had been published in a magazine without her consent. Bobo v. State (Ark.) 589 S.W.2d 5.

SEARCH AND SEIZURE

Warrantless entry by a police officer 30 minutes after the fire was out for the sole purpose of seizing a sawed-off shot gun observed by a fireman was not justified by exigent circumstances. United States v. Hoffman (9th Cir.) 607 F.2d 280.

SEARCH WARRANTS

Officer, who complied with Mincy by tending to the emergency then leaving before they could determine exactly what was evidence of the arson/homicide they found, could not be expected to describe the evidence they wanted to seize in a warrant. Here a warrant to search for evidence of murder was sufficiently specific. State v. Hodges (Or.App.) 603 P.2d 1205.

DEATH - HOMICIDE

The common law test for death and the Harvard Medical School or Commissioners on Uniform State Laws brain death test, "if properly supported by expert testimony," are all acceptable tests for whether death has occurred. State v. Fierro (Ariz.) 603 P.2d 74.

INSTRUCTIONS

Rejecting a defense instruction (verbatim in opinion) that a witness who testified falsely in one part is to be distrusted in others, in favor of the court's instruction (verbatim in opinion) was proper. State v. Austin (Ariz.) 603 P.2d 502.

MEXICAN MAFIA - WITNESSES

Expert testimony about the organization and purpose of the Mexican Mafia completed the picture of the crime and was relevant to show a possible motive for murder under Rule 401, in a case where defendant said a "brother" ordered the killing. The expert's testimony was admissible under Rule 703, even though it was based on hearsay, since the hearsay was of a type reasonably relied upon by experts. State v. Fierro (Ariz.) 603 P.2d 74.

PICTURES - PHOTOS

A picture of the decomposing body of the victim taken from several feet away was properly admitted to corroborate the testimony of the state's principal witness and to show malice by showing the method of disposing of the body in an isolated locale. State v. Austin (Ariz.) 603 P.2d 502.

PRIOR BAD ACTS

Admission of a subsequent bad act under Rule 404(b) to prove identity or modus operandi was error where the differences between the crimes outweighed the similarities. The error was harmless since the jury was instructed not to find defendant guilty of some crimes because he was guilty of others, the evidence was overwhelming, and the subsequent act was relatively innocent. State v. Jackson (Ariz.) 603 P.2d 94.

BAIL

The amount of bail should be set at an amount that will assure the defendant's appearance; and it need not be set at an amount the defendant can afford. Ireland v. United States (D.C.App.) 406 A.2d 1259.

COMPETENCY - COUNSEL

There is no constitutional requirement that a defendant must be informed of his right to appeal following his conviction, and his attorney's failure to inform him of such right is not automatically a denial of the defendant's right to competent representation of counsel. Carey v. Leverette (4th Cir.) 605 F.2d 745.

CONFRONTATION

A Florida statute which prevented the defendant from impeaching a witness with specific acts of misconduct which had not resulted in convictions did not infringe on his sixth amendment right of confrontation. Conut v. Turner (5th Cir.) F.2d 89.

COUNSEL - PRO SE

A judge does not abuse his discretion by failing to appoint, sua sponte, standby counsel for a pro se defendant. United States v. Gigax (10th Cir.) 605 F.2d 507.

ENTRAPMENT - INSTRUCTION

A defendant is not entitled to an instruction on entrapment unless he affirmatively pleads entrapment "at a sufficiently early point in the trial." A mere allusion to entrapment during the course of the trial is insufficient to support an instruction on that issue. (Good discussion.) United States v. Levin (3rd Cir.) 606 F.2d 47.

HEARSAY - BRUTON - CONFRONTATION

Where testimony regarding a coparticipant's statements, which implicated the defendants, was admissible as a statement in furtherance of a conspiracy, Rule 801(d)(2)(E), the admission of the testimony did not violate the defendant's right to confront witnesses. (Good discussion.) United States v. Goodman (5th Cir.) 605 F.2d 870.

IDENTIFICATION

Identification of defendant by a witness was reliable and properly admitted, even though the witness had previously picked the photo of a different person as the man who came to his door to learn where the murder victim had lived. The witness responded to his subpoena, sat down in the courtroom with several people, saw defendant sitting in the audience and went and told the prosecution about the defendant. State v. Marshall (Wis.) 284 N.W.2d 592.

JUDGE

Where the defendant was allowed to withdraw his guilty plea, the fact that the judge had read the presentence report between the plea and the withdrawal did not require his disqualification. United States v. Clark (5th Cir.) 605 F.2d 939.

JUVENILES

Attempting to get a juvenile to model a jock strap when defendant was not in the jock-strap business constituted contributing to the delinquency of a minor. Holton v. State (Alaska) 602 P.2d 1228.

TRESPASS - FIRST AMENDMENT

"The fact that one is exercising first amendment rights while violating otherwise proper restrictions upon their entry to a public facility does not insulate them from prosecution for trespass." Downer v. State (Fla.) 375 So.2d 840 at 844.

SEARCH WARRANT

Officers executing a warrant to search the defendant's apartment and "all approaches and appurtenances thereto," could search a basement located below the defendant's apartment which was accessible through a door in the apartment. State v. Kimble (La.) 375 So.2d 924.

PHOTO LINEUP - ADMISSIBILITY

A witness' inability to pick the defendant's picture from a photo lineup does not prevent her from identifying the defendant at trial. The failure at the photo lineup affects the weight of the witness' testimony, not its admissibility. United States v. Williams (10th Cir.) 605 F.2d 495.

VOLUNTARINESS OF STATEMENT - UNREASONABLE DELAY

Where the defendants had been arrested with probable cause, a 27 hour delay between their arrest and their initial appearance before a magistrate was not unreasonable, and the statements taken during that time were admissible. State v. Gilbert (S.C.) 258 S.E.2d 890.

WAIVER - COUNSEL

The defendant's failure to retain counsel in the seven-month period following his arraignment became a waiver of that right. The court did not abuse its discretion in refusing to grant the defendant a continuance for preparation when he tried to obtain counsel one week before the trial. United States v. Fowler (5th Cir.) 605 F.2d 181.

BAIL

The court properly forfeited the defendant's bond when he left the state in violation of a bail term. The forfeiture was proper despite the fact that the defendant made all required court appearances and the violation caused no prejudice, cost or inconvenience to the government. United States v. Stanley (9th Cir.) 601 F.2d 380.

BUSINESS RECORDS - HEARSAY

Where the executive secretary of the county medical examiner testified that her main duty was to transcribe autopsy reports dictated by the examiner, that the reports were prepared and signed on the same day as the autopsy, that the medical examiner performed the autopsies and had personal knowledge of the contents of the reports, and that the reports were prepared in the ordinary course of business, the autopsy reports were admissible under the business records exception to the hearsay rule. Burleson v. State (Tex.Cr.App.) 585 S.W.2d 711.

CONSPIRACY

The fact that a coconspirator acted to frustrate the objectives of the conspiracy did not establish the termination of the conspiracy as far as the defendants were concerned. Although other coconspirators might have withdrawn from the conspiracy, the defendants still had to establish their own withdrawal. United States v. Katz (2nd Cir.) 601 F.2d 66.

DEATH PENALTY - AGGRAVATING CIRCUMSTANCES

The offenses of armed robbery and burglary which were lesser offenses arising out of the same transaction as the victim's death, could properly be used as aggravating circumstances for the imposition of the death penalty even if they could not be punished separately. Legare v. State (Ga.) 257 S.E.2d 247.

DOUBLE JEOPARDY - PERJURY

Although the court considered the defendant's perjury in sentencing him for a narcotics conviction, double jeopardy did not bar the defendant's prosecution on charges of perjury. United States v. Wise (4th Cir.) 603 F.2d 1101.

ELECTRONIC SURVEILLANCE - CONSENT

An informant's consent to the recording of his conversations is not violated because the government extended benefits to him in exchange for his cooperation. United States v. Horton (7th Cir.) 601 F.2d 319.

FIFTH AMENDMENT - ARGUMENT

Stopping the trial and asking the court to give the witness her rights, because it was becoming apparent she might have been present during the rape, was not grounds for a mistrial. The facts from which the prosecutor drew his inference were already properly before the jury. Thompson v. State (Ga.App.) 258 S.E.2d 181.

MOTION IN LIMINE - ARGUMENT

The court did not err in ordering in limine that neither the prosecution nor the defense could make any statements or arguments regarding possible penalties. Inman v. State (Ind.) 393 N.E.2d 767.

SERIOUS BODILY INJURY

Serious bodily injury is substantially synonymous with great bodily injury. A broken hand constitutes great bodily injury. People v. Kent (Cal.App.) 158 Cal.Rptr. 35.

SEARCH WARRANT

The untimely return on an otherwise valid search warrant does not mandate the suppression of the evidence seized thereunder where the defendant does not show any prejudice. People v. Couch (Cal.App.) 158 Cal.Rptr. 647.

A magistrate may issue a search warrant containing only a generic description of the goods to be seized if there is evidence before him establishing a reason to believe that a large collection of similar contraband is present and the evidence shows a method by which the executing officers can differentiate between the contraband and any other items. United States v. Cortellesso (1st Cir.) 601 F.2d 28.

WEAPONS - PRIOR BAD ACTS

Although hands and feet are not normally deadly weapons, the manner in which they are used may make them deadly. Hands used in an attempt to choke infer an attempt to kill and are deadly weapons. State v. Rupe (Kan.) 601 P.2d 675.

SEARCH AND SEIZURE

Where the police made an illegal entry into the defendant's apartment and discovered a body, the body and other evidence discovered at the scene were not subject to suppression. Since the odor of decay had already permeated the apartment it "would have spread to the adjoining apartments and inevitably have led to the discovery of the body." The exclusionary rule was not applicable because the police would have eventually obtained the evidence without the search. State v. Breede (N.H.) 406 A.2d 125.

Where the police had probable cause to believe that the defendant, who was armed and had just murdered his wife, was in his trailer, they could enter the trailer without a warrant for the purpose of effecting his arrest. The fact that the witness also had information indicating defendant was not in the trailer didn't matter, since the information was not communicated to the officers prior to the search. State v. Allison (N.C.) 257 S.E.2d 417.

Officers may enter commercial premises during a routine after-hours security check undertaken to protect the owner's interest, after discovering the premises in jeopardy, when they believe the owner would consent, for the purpose of making sure that no intruders are present. Someone responsible for the premises should be notified afterwards. Here, narcotics seized after the officers investigated a door propped open late at night were properly admitted. State v. Myers (Alaska) 601 P.2d 239.

CHAIN OF CUSTODY - IDENTIFICATION

Defendant's statements that he robbed the jewelry store and the witness' observations of jewelry story tags on the items the defendant gave the witness, were sufficient to sustain the admission of the jewelry into evidence, even though no one could positively identify the jewelry as jewelry taken from the store during the robbery. State v. Carriger (Ariz.) 599 P.2d 788.

CONFLICT OF INTEREST - GUILTY PLEA

The fact that a non-involved prosecutor was a member of the public defender's office when it had previously represented defendant in another case did not require disqualification of the prosecutor's office, since the prosecutor had received no confidential information about defendant's prior case when he was a public defender. In a footnote the court indicates defendant's guilty plea waived any error in the prosecutor actively prosecuting him in a second murder case. State v. Smith (Ariz.) 599 P.2d 187.

CROSS EXAMINATION - WITNESSES

There was no prejudice to defendant in his attorney's failure to cross-examine the witness about prior convictions, since the state had already done so on direct examination. Since the defense attorney failed to ask the questions on cross-examination, he could be precluded from calling the witness and asking the witness about the convictions on direct exam. State v. Carriger (Ariz.) 599 P.2d 788.

DEATH PENALTY - MITIGATING FACTORS

A defense psychiatrist's testimony that defendant could not control his conduct was rebutted by a state psychiatrist. Accordingly the court's refusal to find the mitigating factor was not an abuse of discretion. State v. Smith (Ariz.) 599 P.2d 199.

EXPERT TESTIMONY

The inability of the expert to identify the blood stains on defendant's clothing as human blood stains did not prevent the expert from giving his opinion that the stains were blood stains. State v. Carriger (Ariz.) 599 P.2d 788.

INDIGENTS - EXPERTS

Denying the indigent defendant a jury selection expert and a university professor to make a telephone survey to assist in a motion for change of venue was proper, since these were not matters bearing on the ultimate issue of guilt or innocence of the defendant. State v. Smith (Ariz.) 599 P.2d 187.

PICTURES - PHOTOS

Admission of photos of a bloody mattress where the rape/attempted murder took place was not error since it corroborated and explained the testimony of the victim. Further, defense counsel failed to object to other bloody photos, and the defense was misidentification, so the accuracy of the victim's perceptions was important. State v. Smith (Ariz.) 599 P.2d 199.

PRIOR BAD ACTS

Admission of prior bad acts is prejudicial unless the prior bad acts fit within a Rule 404 (b) exception or are admissible for impeachment purposes pursuant to Rules 608 (b) and 609. Testimony that defendant's car had been impounded because it was involved in some offense was not reversible error, since it was unclear whether the car was merely involved in a traffic violation and defendant brought out his record in an effort to show that the police framed him. State v. Smith (Ariz.) 599 P.2d 199.

SEARCH AND SEIZURE - CHAIN OF CUSTODY

Removing keys taken from defendant at booking from defendant's property, without a search warrant, 97 days after booking is constitutionally permissible. Testimony the keys looked like keys taken from defendant, coupled with testimony the keys offered into evidence were taken from defendant's property constituted sufficient chain of custody to make the keys admissible. State v. Carriger (Ariz.) 599 P.2d 788.

SUFFICIENT EVIDENCE - DEATH PENALTY

A conviction and death penalty based solely on circumstantial evidence are upheld. State v. Carriger (Ariz.) 599 P.2d 788.

TRIAL - INVITED ERROR

Any error in a prosecutor or a witness mentioning a first trial, which resulted in a mistrial, was invited error and waived by failure to timely object. Further there is no authority for the proposition that mere mention of a prior trial constitutes reversible error. State v. Lawrence (Ariz.) 599 P.2d 754.

VOLUNTARINESS OF STATEMENTS

Police officers' testimony that they told defendant that they could not make deals about murder cases or getting cases reversed on appeal, that defendant's family would be given police protection if necessary, and that out-of-state prison sounded like a feasible idea, did not make his subsequent confession involuntary. Defendant told people he wanted to talk to the police, waived Miranda, then demanded the stipulations above. State v. Smith (Ariz.) 599 P.2d 199.

GUILTY PLEA - HOMICIDE

Ignoring eyewitness testimony identifying defendant as the killer, defendant's admissions that he participated in an attempted robbery during which the killing occurred formed a sufficient factual basis to sustain his guilty plea to first degree murder. State v. Hills (Ariz.) 605 P.2d 893.

HOMICIDE - CAUSE OF DEATH

Malpractice is a defense "only if the death is attributable solely to the medical malpractice and not induced at all by the original wound" (emphasis in original). Defendant caused the stab wound which eventually killed the victim, after the physician failed to discover a perforated intestine, so defendant caused the death. State v. Hills (Ariz.) 605 P.2d 893.

DEATH PENALTY - SENTENCE

Defendant is not entitled to a bill of particulars describing the aggravating circumstances the state will rely on and prove at sentencing. Clark v. State (Fla.) 379 So.2d 97.

DOUBLE JEOPARDY

The defendant could be convicted of assault with a deadly weapon and voluntary manslaughter for the same act committed on the same person, since the use of a deadly weapon is not required to convict on a charge of voluntary manslaughter. Walker v. Loggins (9th Cir.) 608 F.2d 731.

GUILTY PLEA - TRIAL

Where defendant's federal guilty plea was still in effect at the time of defendant's state trial for the same offense, admission of defendant's statements at the federal guilty plea proceeding was not reversible error. State v. Aberti (Hawaii) 605 P.2d 937.

HYPNOSIS - IDENTIFICATION - JURY

A victim's identification of defendant made from present recollection refreshed after having been put under hypnosis, was admissible where the victim, after coming out of a hypnotic trance, was able to identify suspects in a photographic line up. No suggestion of the suspects was made during the trance, and the identification was made after the victim was fully conscious again. (Cites Ninth Circuit, Oregon and Maryland approval of similar testimony.) Clark v. State (Fla.App.) 379 So.2d 372 (1980).

INFORMANTS - PUBLIC TRIAL

The defendant was not deprived of his Sixth Amendment right to a public trial where the judge excluded all spectators from the courtroom during the testimony of a government informer who had been threatened in connection with the case. Further, not requiring pretrial disclosure of the informant's address was proper, since the court could have refused to allow the defense to know the address at all. Informers whose addresses are disclosed prior to trial are often among the missing when the trial occurs. United States v. Hernandez (9th Cir.) 608 F.2d 741.

INSTRUCTION - PRESUMPTIONS

An instruction which read, "[i]t is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted," did not unconstitutionally shift the burden of proof onto the defendant. United States v. Davis (6th Cir.) 608 F.2d 698.

JUDGE - MISTRIAL

A judge who referred to the defendants as "bad bastards" in a private conference with a defense attorney friend, should have declared a mistrial and disqualified himself. State v. Nordstrom (R.I.) 408 A.2d 601.

LEADING QUESTIONS

In a prosecution for child molesting, the court did not abuse its discretion by allowing the prosecutor to lead the child victim/witness. State v. Brown (S.D.) 285 N.W.2d 843.

PRETRIAL PUBLICITY

In a case involving the takeover of several buildings in Washington D.C. by Hanafi Muslims, the defendants could not complain that they had been denied a fair trial because of prejudicial pretrial publicity, since they had actively sought the publicity. Khaalis v. United States (D.C.App.) 408 A.2d 313.

RAPE - PREGNANCY

Evidence of pregnancy of a prosecutrix after an alleged rape, where the time of conception coincided with the time of the rape, was properly admitted since it was offered to prove one of the three essential elements of rape (sexual intercourse). Defendant hadn't admitted that intercourse ever occurred and the victim testified her husband took contraceptive precautions. Hall v. State (Ala.Cr.App.) 378 So.2d 1193.

SEARCH AND SEIZURE

Defendant removing a sack from his car to make a sale in his apartment to an informer, then tossing the sack in the car when he saw the arresting officers approaching, constituted exigent circumstances justifying the officers' entering the car and seizing the sack. Any one of several other related people could have taken the car and contraband, other people in other apartments could have taken contraband, and posting a guard until a search warrant could be obtained is little different for constitutional purposes than an immediate warrantless search. State v. Reese (Hawaii) 605 P.2d 935.

SEARCH AND SEIZURE - ROADBLOCKS

Where officers had probable cause to believe a serious (violent) felony had been committed (victim's report), it was highly likely the felons were on a ferry, and stopping each car as it left the ferry and looking in the trunk for the felons constituted "a reasonable likelihood of success and a minimal intrusion on the public," the search is upheld. State v. Silvernail (Wash.App.) 605 P.2d 1279.

SEARCH WARRANTS - ARREST

A police officer with an arrest warrant does not have to get a search warrant prior to entering a private dwelling in order to arrest the person named in the warrant, as long as the officer has probable cause to believe the person is in that dwelling. A fleeing suspect by definition is inherently mobile, constituting exigent circumstances. State v. Jordan (Or.) 605 P.2d 646.

SEARCH WARRANTS - INFORMANTS

Oregon joins the clear majority of states holding that naming the citizen-informant in the search warrant was sufficient showing that the informant was reliable. State v. Montigue (Or.) 605 P.2d 656.

SENTENCE - PRIOR CONVICTION

A conviction for an offense which was classified as a felony at the time of its commission but which was subsequently reclassified as a misdemeanor may properly be considered a prior felony conviction for multiple offender purposes. State v. Blackwell (La.) 377 So.2d 110.

STOP AND FRISK

A stop and frisk was reasonable where the defendant was observed with a bulge in his coat, was wearing unseasonably warm clothing on a hot day, and had a prior arrest record for illegally possessing firearms. These facts did not amount to probable cause, but justified a frisk where contraband was found. State v. Ramos (Fla.App.) 378 So.2d 1294.

VOLUNTARINESS OF STATEMENTS

In a lesbian love triangle murder, officers urging defendant to tell the truth and telling her that a show of remorse sometimes mitigates punishment did not constitute grounds for suppressing the statements. Defendant's confession was not coerced since no specific threats or promises were made, she was adequately advised of her constitutional rights, she was not in an exhausted state, and the interview was taped for later review. People v. Andersen (Cal.App.) 161 Cal.Rptr. 707.

COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY

BUREAU OF CHILD SUPPORT OPERATIONS

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HERBERT M. JACOBOWITZ DIRECTOR

ATTORNEY GENERAL'S OFFICE
HELENA, MONTANA

MAY 1980

RECEIVED

April 30, 1980

The Honorable Michael T. Greely
Attorney General of Montana
State Capitol
Helena, Montana 59601

Dear Mr. Greely:

In re Processing Responding URESA Complaints

The purpose of this letter is to acquaint your agency with Los Angeles County's procedures for processing responding complaints. Our procedure has been adopted to accommodate a workload of some 60,000 reciprocal cases.

The complaint is received and filed by the Legal Processing-RESL Unit, 18000 Criminal Courts Building, 210 West Temple Street, Los Angeles, California 90012. An acknowledgment of the complaint including the assigned RESL number is sent to the initiating prosecuting agency. Two copies of the complaint are sent to the District Attorney, Bureau of Child Support Operations, 5555 Ferguson Drive, Commerce, California 90022, for prosecuting activity.

It will take approximately 90 days to obtain an order, provided we are able to effect personal service upon the respondent. A copy of the Order Setting Case for Hearing will be forwarded to the initiating prosecuting agency. Two copies of the Court's Order will be forwarded within 30 days after the hearing to the initiating court; the initiating court should forward a copy to the prosecuting agency. If we are unable to effect personal service upon the respondent, the initiating prosecuting agency will be notified.

When a support order is made, our Automated Child Support Enforcement System will monitor enforcement. We will notify the initiating prosecuting agency if enforcement remedies are taken.

Our telephone number is (Area Code 213) 728-1000. Due to the physical layout of the office, our case files are not readily accessible to the investigators or attorneys. Therefore, our practice for handling telephone calls is to answer the inquiry if the case file is not needed, but otherwise take a message. Messages will be matched with case files within three-to-five working days, under normal circumstances, and processed for appropriate action. Return calls will be made, if necessary.

Whenever contacting our office, please provide our RESL Number. Our filing system is based on this number. Without this number processing of your letter or message will be delayed. In the URESA Section we receive 30,000 pieces of mail and 2,000 telephone messages monthly. Items that have the correct RESL Number will be processed sooner.

It is our intent to provide equitable and effective service to petitioners or their representatives. Please share this information with your local agencies. Thank you for your cooperation.

Very truly yours,

JOHN K. VAN DE KAMP
District Attorney

By Herb Jacobowitz
HERBERT M. JACOBOWITZ
Director

wp/rh

MEMO

AMERICANS FOR EFFECTIVE
LAW ENFORCEMENT, INC.
501 Grandview Dr. Suite 207
So. San Francisco, CA 94080

To: All state Attorney Generals
State Prosecutor Training Coordinators
State Prosecutor Executive Directors

April, 1980

ATTORNEY GENERAL'S OFFICE
HELENA, MONTANA
APR 2 1980
RECEIVED

Re: AELE **amicus curiae** program

The enclosed brochure gives you a brief look at AELE. In the past 3 years we have filed 61 **amicus** briefs with the U.S. Supreme Court and other appellate courts.

No less than 22 states and numerous national, state and local organizations have joined AELE in filing friend of the court briefs in the U.S. Supreme Court. A complete list of organizations and states joining our briefs is on p. 3. Also enclosed is a list of cases in which we have filed **amicus** briefs.

The purpose of this memo is to establish (or reaffirm) lines of communication between AELE and state Attorney General offices in two ways. First, we are constantly looking for significant cases to enter where our briefs could be helpful. Second, we always welcome States as parties to our **amicus** briefs.

None of you can afford to ignore cases before the U.S. Supreme Court that challenge a police procedure or statute similar to laws or practices in your own state. More is at stake than the litigation between a criminal defendant and a single prosecution.

You might ask, what can an **amicus** brief say that isn't said in the state's brief? First of all, the court will be impressed with the importance of the case at bar. Second, the justices are diverted from the narrow points on appeal and directed to the practical effects of a ruling to the officer on the street. Third, an **amicus** brief adds a more philosophical approach to the decision-making process.

A prosecution brief must ask for affirmance of a conviction or reversal of a motion to suppress; that is the duty of the state's attorneys. This is true even if the state's lawyers feel they are unlikely to prevail on appeal. A "friend of the court" brief can ask the justices to decide the case in a narrow context and limit its future application. For example, we can say, "If however, the Court chooses to rule for the defense, we urge that this court limit its holding to...."

Although we have not established firm rules on topics we are interested in, the following guidelines may be of use to you. Cases we normally consider more appropriate for an **amicus** brief include these issues:

- Arrest, unlawful or false
- Confessions and interrogation techniques
- Civil liability of police
- Exclusionary Rule
- Searches, with or without warrant
- Stop-and-frisk

Cases in which we have less or little interest in pursuing, include the following:

- Evidentiary rules of a purely technical nature
- Obscenity and abortion laws
- Labor/management or police disciplinary disputes
- Police benefits, e.g., pension suits
- Racial discrimination in employment
- Sexual discrimination in employment

AELE is a small, privately-supported tax-exempt organization. Unlike the ACLU or NAACP, we do not have a supply of lawyers and law students who regularly volunteer to write briefs or do legal research. Our resources and time are very limited, and the number of cases in which we can participate in are few. In some cases, local attorneys have written briefs in our behalf at no cost to us, and we are always glad to accept these offers.

Please keep AELE in mind, and alert your assistants about us. Call us if you are litigating an important case and would like to have an **amicus** brief in support of your positions. Also call us if the Supreme Court has granted certiorari in a case you are closely watching; if we plan to file in that case, your state is most welcome to join our brief.

Finally, we are also enclosing a copy of our publication on the civil liability of governmental lawyers. We also still have a few copies of our handbook, **Criminal Appellate Advocacy,** which was produced after a workshop by that title sponsored by AELE and the National College of District Attorneys.

Yours very truly,

WAYNE W. SCHMIDT
Executive Director
(415) 877-0731

PROF. FRED E. INBAU
Chairman of the Board
(312) 649-8466

STATES JOINING AELE BRIEFS, THROUGH THEIR ATTORNEY GENERAL:

Alabama
Arizona
Arkansas
California
Florida
Idaho
Illinois
Indiana
Maryland
Montana
Mississippi
Nebraska
Nevada
New Jersey
New York
North Dakota
Oklahoma
South Dakota
Utah
Virginia
West Virginia
Wyoming

NATIONAL ORGANIZATIONS JOINING AELE BRIEFS:

American Assn. of Presidents of Independent Colleges and Universities
International Association of Chiefs of Police
National District Attorneys Association
National Sheriffs' Association

STATE OR LOCAL ORGANIZATIONS JOINING AELE BRIEFS:

California District Attorneys' Association
California Law Enforcement Legal Advisors' Assn.
District of Columbia Government (Police Department)
Fraternal Order of Police, Blue Grass Lodge No. 4 (Kentucky)
Illinois Association of Chiefs of Police, Inc.
Illinois Police Association
Kentucky Association of Chiefs of Police
Kentucky Law Enforcement Council
Michigan Association of Chiefs of Police
North Carolina Assn. of Chiefs of Police, Inc.
North Carolina District Attorneys' Association, Inc.
North Carolina Police Executives Association, Inc.
North Carolina Association of Police Attorneys, Inc.
North Carolina Sheriffs' Association, Inc.
Peoria, Illinois, the City of
Peoria Police Benevolent Association (Illinois)
Policemens' Benevolent and Protective Assn. of Illinois
Saint Louis, Metropolitan Police Dept. of the City of
San Francisco, City and county of

AELE Amicus Curiae Briefs

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1263.

LOU V. BREWER, WARDEN,
Petitioner,
vs.
ROBERT ANTHONY WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, UTAH, VIRGINIA, WEST VIRGINIA AND WYOMING.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1721.

UNITED STATES OF AMERICA,
Petitioner,
vs.
JOSEPH A. CHADWICK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.; AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICES, INC.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 5937

VENTURA E. YBARRA,
Appellant,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE STATE OF MONTANA, AS AMICI CURIAE IN SUPPORT OF THE APPELLEE.

FRED B. INBAU, ESQ.
WAYNE W. SCHMIDT, ESQ.
FRANK G. CARRINGTON, JR., ESQ.
JAMES P. MANAK, ESQ.

IN THE

Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellant,* vs. LOUIS SMITHERS, *Defendant-Appellee.*	Appellate Court No. 78-311 (Third District) Supreme Court No. 52537 On Appeal from the Appellate Court of Illinois Third District and the Circuit Court of the Tenth Judicial District, Peoria County. Honorable Robert E. Manning, Judge Presiding.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., THE ILLINOIS POLICE ASSOCIATION, THE CITY OF PEORIA, A MUNICIPAL CORPORATION, THE PEORIA POLICE BENEVOLENT ASSOCIATION, AND THE POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION OF ILLINOIS, IN BEHALF OF PLAINTIFF-APPELLANT, PEOPLE OF THE STATE OF ILLINOIS

LAWSUITS AGAINST POLICE SKYROCKET; FEW PLAINTIFFS EVER CONVINCE JURIES HOWEVER

If present trends continue, perhaps in excess of 26,000 lawsuits will be filed against law enforcement personnel in 1980. Some 21,000 will allege false arrest, brutality, wrongful death and other intentional misconduct; another 5,000 will claim motor vehicle negligence. AELE recently completed a preliminary analysis of its second five-year survey of police misconduct litigation. The ten-year totals show that from 1967 through 1976, civil suits against police rose by 517 percent!

The decennial analysis was undertaken to measure the positive and adverse effect of lawsuits on police performance. Restrictive court decisions in criminal cases have well-known and frequently documented adverse effects. However, the threat of damage awards and injunctive relief can also undermine police effectiveness. An estimated one million hours are annually consumed investigating civil suits against police, and an equal or greater amount of time is spent by attorneys in defending these cases.

No one, of course, can criticize the right of a citizen to sue law enforcement officers for legitimate injuries. However, although some meritorious claims are settled, less than **four percent** of all suits filed ever result in a plaintiff's verdict! The vast majority of cases appear to be groundless. Many are filed to harass conscientious police officers, to obtain revenge or to provoke discussions leading to the dismissal or reduction of criminal charges pending against a plaintiff.

"In 1976 a typical law enforcement agency received one civil suit for every 51 full time officers . . . ."

The two five-year surveys included a cross section of 2,060 law enforcement agencies that, in 1977, employed 153,130 officers, or about one-fourth of the nation's total. Table one projects the number of suits for the entire law enforcement establishment.

TYPES OF SUITS

The types of suits filed, where known, changed somewhat in the second five-year survey. False arrest suits, although increasing in number, as a percentage of the total fell from 41.7 percent to 32.1 percent. "Brutality" suits increased slightly; together the two categories gave way slightly to increased litigation over jail facilities and miscellaneous claims. Suits alleging firearms injuries or fatalities remained nearly constant, rising from 5.4 to 6.8 percent of the total.

AELE concedes that civil litigation provides an added incentive for police administrators to continually evaluate departmental procedures and monitor practices of specific officers. The overwhelming volume of suits, however, is counterproductive to this end. Frivolous claims in large numbers will only numb or desensitize a responsible law enforcement executive. Truly legitimate citizen complaints are overshadowed by thousands of factitious claims.

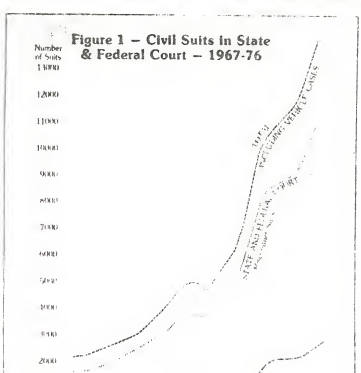
The survey indicates that the number of federal and state civil suits for misconduct against city police, county sheriff's personnel and state patrol officers increased 1.0m an estimated 1724 suits in 1967 to 10,673 in 1976. In 1976 a typical law enforcement agency received one civil suit for every 51 full time officers. Although state troopers, as a whole, were sued less frequently, city police officers were sued more often than troopers and sheriff's deputies. The rise in civil suits during this ten-year period was steady and dramatic, as shown on the graph at figure 1.

Table 1 — Projected Number of Suits Filed Against State, County & Local Officers

The projected number of suits in state and federal courts, plus vehicular claims, appears in table 1.

Year Suit Filed	Suits in State Courts (Misconduct)	Suits in Federal Courts (Civil Rights)	Motor Vehicle Suits	Total Suits Filed	Misconduct Suits Per 1000 Officers
1967	1,556	107	450	2,170	5.48
1968	1,665	189	484	2,338	5.58
1969	2,045	322	618	2,985	6.53
1970	2,201	794	783	3,778	7.77
1971	2,318	1,545	1,009	4,872	9.30
1972	2,645	1,101	979	4,725	8.95
1973	3,744	1,044	1,250	6,038	9.77
1974	5,959	1,671	1,994	9,624	15.11
1975	6,750	2,178	2,335	11,263	17.11
1976	8,007	2,626	2,778	13,411	19.64

The slight rise of "brutality" claims is probably not significant. Many such suits also allege false arrest, and agencies were asked to classify each suit by its principal category, requiring a judgment to be made by the person responding. Injunctive relief actions, relatively few as a percentage, but numerous in jail related litigation where injunctive relief is often sought, offset the former.



"Differences between agencies should not be misinterpreted as a behavioral pattern . . ."

Table 2 shows the type of lawsuit filed per one hundred officers in each of the broad categories of law enforcement agencies. Motor vehicle suits are included in column "G" and excluded in column "H". Unknown allegations were eliminated in both columns.

Differences between agencies should not be misinterpreted to be a behavioral pattern. Inequalities probably reflect differences in duties performed. In most jurisdictions, for example, sheriff's departments also serve civil process, operate jails or farms and perform courtroom security functions. In some counties these functions predominate over traditional law enforcement duties. State patrols are primarily traffic enforcement agencies; manpower may be more a function of road miles and vehicular traffic than resident population. Some of the federal agencies surveyed are primarily investigative, and not enforcement oriented. It is also commonly believed that a greater than proportional number of suits are filed in urban areas of the country.

Table 2	NUMBER AND TYPE OF SUIT FILED PER HUNDRED OFFICERS – 1972-77						PERCENT OF TOTAL BY TYPE**		
TYPE OF LAWSUIT FILED	A Local Police	B County Sheriffs	C Federal Agencies	D State Patrols	F Other* Agencies	F Total 1972-77	G 1972-77 All Suits	H 1972-77 Misconduct	I 1967-71 Misconduct
False Arrest, Imprisonment, Prosecution	2.43	2.43	1.23	.81	2.06	2.05	24.9	32.1	41.7
Assault and Battery – Non Deadly Excessive Force	2.66	.92	1.07	1.10	2.41	2.01	24.5	31.5	27.9
Firearms Related Injuries Caused	.31	.06	.14	.09	.19	.22	2.7	3.4	3.2
Firearms Related Death Caused	.33	.04	.03	.07	.04	.22	2.7	3.4	3.2
Motor Vehicle Injuries	1.54	.23	1.93	.75	.50	1.15	14.0	N/A	N/A
Property Damage (Includes Collisions)	.82	.58	1.90	.31	.23	.69	8.4	N/A	N/A
Libel, Slander, Defamation	.15	.12	.23	.08	.23	.14	1.7	2.1	.9
Poor Jail Conditions or Facilities	.11	1.02	.41	.00	.31	.24	2.9	3.7	.9
Illegal Search and Seizure	.23	.22	.23	.19	.50	.23	2.8	3.6	2.8
Invasion of Privacy	.13	.09	.28	.07	.04	.11	1.3	1.8	1.6
Injunctive Relief	.30	.16	.00	.13	.47	.23	2.8	3.7	6.1
Miscellaneous	1.02	.86	1.21	.64	2.72	.94	11.4	14.6	11.6
Unknown Allegations	.23	.20	.00	.23	.47	.64	**	N/A	N/A
TOTAL Suits Filed	10.95	6.94	8.78	4.47	10.17	8.86	100.0	100.0	100.0

*Other agencies includes campus police, transit police, constables, harbor police, etc.
**Unknown lawsuits eliminated for the purpose of this column. Column G, H and I.
NOTE: The local police, sheriffs, federal agencies, state patrols and other agencies are those listed in Table 1. Miscellaneous allegations include [illegible]. The total number of suits in column F may be more than the sum of columns A through E because [illegible].

Table 3 indicates the status of suits filed for the two five-year periods where disposition is known. The disposition is not surprising. More suits, as a percentage, were still pending in 1976 than in 1971. More were settled, perhaps to reduce the number of pending claims, and perhaps because police — as defendants — have a clearer picture of their liability.

STATUS	PERCENT OF SUITS BY STATUS	
	1967-71	1972-76
Suits still pending	32.1	41.2
Suits settled	14.4	27.5
Dropped by plaintiffs or dismissed on a motion	29.4	22.6
Number tried in court which police WON	19.6	10.1
Number tried in court which police LOST	4.5	3.5

AELE has aggressively responded to the challenge caused by the flood of civil suits against police. In 1973 AELE began a "Legal Defense Center" to research law enforcement practices in light of changing civil liability patterns. AELE initiated a Liability Reporter, which is a monthly synopsis of appellate court decisions; a quarterly Defense Manual which discusses specific topics in each issue (such as use of handcuffs, firearms policies, ammunition choices, emergency vehicle driving, forcible entries, the Civil Rights Acts, etc.); and the monthly Jail and Prison Law Bulletin.

In 1974 AELE inaugurated a continuing series of three-day workshops on police liability for law enforcement administrators and their attorneys. Four were held in 1979 (Chicago, Houston, New Orleans and San Francisco), four are scheduled for 1980 (Minneapolis, Orlando, San Francisco and Washington, D.C.). Approximately 100 police chiefs, sheriffs, administrators and attorneys attend each program.

AELE also offers an 80 minute slide and cassette audio-visual training package for sale or rent to departments of every size. These are extensively used in annual in-service training programs or segmented training in roll-call sessions. Thus officers of all ranks and assignments can obtain a professional overview of police liability and citizen rights.

Sample copies of AELE publications and brochures describing the workshops and audio-visual programs are available on request.